No. 708

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

C. C. McCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE,
Defendants in Error.

BRIEF FOR THE UNITED STATES.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

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STATEMENT.

This case has been before this Court as No. 599 and a decision rendered, in part sustaining and in part reversing the lower Court, which decision will be found in 104 Federal, page 669. (Record, p. 26.)

This is a suit by the United States as plaintiff against C. C. McCoy, as principal defendant, and his bondsmen, as co-defendants, for $5,772.99 and interest, actual damages alleged to have been sustained by the plaintiff on account of the failure of McCoy to perform a contract for the transportation of mail matter on Route No. 76,475.

The case came on for trial on the issues joined by plaintiff's amended complaint (page 1 Record), and a general denial by the defendants (page 17 Record)

The plaintiff put in evidence, in support of its case, the exhibits which appear in the Record, beginning at page 52, and to which more particular reference will be made hereafter, and rested.

The defendants moved for a non-suit "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case," which motion was granted by the Court, and the plaintiff duly excepted (pages 19 and 20 Record), from which order and judgment of non-suit the former writ of error was sued out.

Thereafter, in this Court, on October 8th, 1900, a mandate and opinion (Transcript of Record, pages 24 and 26), were made, rendered and filed reversing the judgment of non-suit

entered below as regarding an item of five dollars on account of a fine for that amount imposed by the Postmaster General upon the defendant McCoy, and sustaining the lower Court as regards the greater amount for which the action was brought, that is, for damage resulting from the failure to perform his contract, this Court holding with the lower Court that the evidence introduced by the plaintiff in error below was legally insufficient to make out a prima facie case and to make out a breach of contract by the defendants or its abandonment by McCoy. The said cause was thereby remanded to the lower Court with instruction to take further action in accordance with the opinion of this Court. Thereafter, on the 9th day of May, 1901, the case came on regularly for trial in the lower Court (Transcript of Record, page 33), a jury was impaneled, and counsel for Plaintiff in Error moved for a continuance on account of the absence of a material witness (Transcript of Record, pages 33, 47 and 48), which motion was denied and exception taken by Plaintiff in Error and allowed by the Court, and the case proceeded to trial. Plaintiff introduced substantially the same evidence as upon the former trial (Transcript of Record, page 52 et seq.), and then rested its case. Defendants elected to put in no evidence, and the case was submitted, plaintiff requesting an instruction directing the jury to return a verdict for the full amount for which suit was brought, which instruction was refused, to which Plaintiff in Error took and was allowed an exception. (Transcript of Record, page 114.) Where upon the Court, at the request of the defendants, instructed the jury that plaintiff had introduced no evidence legally sufficient to justify a verdict against the defendants except as to the one item of the five dollar fine before mentioned, and

directed the jury to return a verdict for that amount, to which instruction the Plaintiff in Error then took and was allowed an exception. (Transcript of Record, pages 114 and 115.) In accordance with which instruction a verdict was so returned. (Transcript of Record, pages 33 and 34.) Thereafter, on May 10th, 1901, a notice and motion for a new trial was by the Plaintiff in Error served and filed. (Transcript of Record, pages 34 and 36.) Thereafter, on May 11, 1901, the said motion for a new trial was denied and judgment rendered upon and in accordance with the verdict, to which the Plaintiff in Error took and was allowed an exception. (Transcript of Record, pages 36 to 38.) Thereafter Plaintiff in Error duly sued out and perfected a writ of error to this Court. (Transcript of Record, pages 38 to 46.) The said cause is now before this Court for hearing and argument upon the following

ASSIGNMENT OF ERRORS.

First. The Court erred in holding that the plaintiff was not entitled to a continuance upon the showing and affidavit made and filed by it for that purpose.

Second. The Court erred, upon the completion of the plaintiff's testimony, no testimony being introduced by the defendants, to give the instruction requested by plaintiff's counsel.

Third. The Court erred in giving the instruction requested by defendant's counsel, and in holding that the duly certified records, orders, balances, certificates, accounts and other papers and documents from the office of the auditor of the Postoffice Department in relation to said cause, as intro-

duced and admitted upon the trial thereof in behalf of the plaintiff, did not make out a prima facie case against the defendants and each of them.

Fourth. The Court erred in refusing to grant plaintiff's motion for a new trial.

Fifth. The Court erred in entering its judgment upon said verdict.

ARGUMENT.

I.

Regarding the first assignment of error, the Court erred in refusing the continuance asked by plaintiff on account of the absence of the witness T. J. Ford. (Transcript of Record, pages 47 to 52.)

Under the ruling of this Court and the lower Court, the testimony to be given by this witness was material and important. The defendants could hardly with grace complain at lack of diligence in being sued. The plaintiff made a showing of diligence and had done everything possible to secure the attendance of this witness at the trial. The Court was not justified in assuming that the witness would disobey a subpoena. There might be many reasons for preferring the attendance at the trial of this witness, in preference to taking his deposition, for in the latter method important rebutting testimony, the presence and necessity of which would develop upon the trial and could not be anticipated, might be lost.

II.

Regarding the second, third, fourth and fifth assignments of error, I will present my points upon those under one head, as they all go to the single question of the sufficiency of the testimony offered by the Plaintiff in Error to jusitfy an investigation of the case by the jury.

Though this question was presented to this Court on the former hearing, it was then done upon an appeal from an order and judgment of non-suit, and not a final judgment, and I now bring this matter before the Court upon an appeal from such final determination, in arriving at which the former rulings of the lower Court, as modified by the ruling and opinion of this Court on appeal therefrom, were adhered to and followed. In this presentation I shall attempt to answer and overcome the position taken by the Court, and the expressed reasons therefor, and reply to the brief of Defendant in Error on such former appeal.

And in doing this, as this Court simply decided that "a material allegation of the complaint was that on the 8th day of May, 1893, the said C. C. McCoy and the said sub-contractors did abandon said contract and did fail and refuse to perform the same, * * * the statement of McCoy's account by the Auditor of the Postoffice Department, * * * the certificate of the Postmaster General dated May 18th, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned the perform-

ance of his contract," without going into the matter of the precedents and reasons leading to that conclusion, I shall assume that they were the arguments used and authorities cited by the Defendant in Error upon that hearing.

In the United States vs. Case, 49 Federal, 270, cited and relied on by Defendants in Error, it was decided that accounts in the Postoffice Department, to support judgment, must have been made up by such officers in a ministerial and not a judicial capacity. Looking at the particular facts in that case, to understand the meaning of this general language and that quoted by the defendant, we find therein that "the officials of the Postoffice Department have charged the defendants *in gross* with 'commissions *illegally* claimed' and 'property *illegally* retained,' without a word of proof, so far as the account showed, to sustain the charges. These officials had tried the questions at issue between the department and the postmaster and found him guilty of *malfeasance*, assessed the damages against him, and certified their findings. The evidence, if there was any, on which these findings were based had not been returned. There is nothing to show what the property was that the postmaster is accused of retaining improperly, or its value, or the reasons which induced the officials of the department to make the charges relating thereto."

It can be readily comprehended that there is a vast difference between that case and the one at bar. In the case at bar the accounting officer who made the entries, kept and certified, as all entries are made in accounts in the ordinary routine, had to find that certain facts existed, of which he had no personal knowledge. He found that there had been a failure of

the contractor to perform, and charged him with the costs to the Government occasioned by that breach or failure. Was not this within the ordinary ministerial duties of such officer of the Postoffice Department as much, if not more so, than to determine that a postmaster in the Philippines has received certain stamps, supplies and property of the United States, or that he had sold them and not accounted for them? These would be everyday matters of bookkeeping, and yet as a matter of common knowledge we must know that none of the men keeping the accounts in Washington have or had personal knowledge of the transactions they enter in such books, and that all such bookkeeping is done by means of what Defendant in Error terms hearsay, but in the ordinary course of business and departmental routine.

In the United States vs. Case, the officials had made a *gross* charge for "commissions illegally claimed" and "property illegally retained." In the case at bar the claim is itemized and the postoffice officials have by the accounts ministerially evidenced certain facts. They haven't judicially undertaken, or judicially determined, that anything was legally or "illegally" done. It was this vice in the action of officials of the Postoffice Department, and their proneness to deduce legal conclusions involving malfeasance, and incidentally fraud, at which the ruling of the Court was aimed. Further, the case seems to have rested on the fact that the statute only authorized the "withholding" of commissions on false returns by the postmaster and did not authorize a *charge*, when the accounts had once in due course been settled and allowed.

The Government's contention in the case at bar is this: The same being a suit to recover a certain sum of money, that the

ultimate fact or issue is, are the defendants indebted in this amount to the United States, the effect of the settled account certified by the Sixth Auditor is not only sufficient to show the items and amounts, but the fact of debt itself. In United States vs. Stone, 106 U. S., 525, at page 530, it is said: "And a separate adjustment of his accounts for both periods made at the Treasury Department upon its books is prima facie evidence not only of the *fact* and the *amount* of the indebtedness, but also of the *time when* and the *manner* in which it arose.

The next case quoted and relied upon by Defendant in Error, United States vs. Fosyth, 6 McLean, 584, Federal Case No. 15,133, was a criminal case and contains a recognition, as I consider, of the distinction I have made above—that items and facts ascertained by the ordinary official action of the department (though the information acted on may involve hearsay), are, when certified, competent evidence when otherwise it would not be so. It was therein said:

"The transcript being offered in evidence was objected to on the ground that the items were not set down from the returns of the defendant, but were returned by his successor from talking with the persons who had paid duties into the office. The treasury transcript is made evidence when duly certified. There is no objection to the authentication of this document, but the items on which a considerable part of it is based, though put into the transcript, are not evidence. They were not ascertained and established *by the ordinary official action of the department*, and consequently they are not evidence. Many of the items were put down by an estimate, and others no better proof of their validity but hearsay, which is not admissible."

This quotation shows that the same fault was involved as in the case of United States vs. Case, supra. There was a gross charge, or worse still, a mere guess or estimate, and further, the charges and items were not made in the ordinary course at the time of the transaction, but made long after from talks held with private, not official, persons interested adversely to the party sought to be charged.

The next case cited and quoted by Defendant in Error is that of the United States against Buford, 3 Peters, page 12. That case was one where the Government was suing the defendant on a treasury statement made upon a receipt given to an officer named Morrison by the defendant and assigned by Morrison to the United States under a special Act of Congress. It was therein said:

"An account stated at the treasury department which does not arise in the ordinary mode of doing business in that department can derive no additional validity from being certified under an Act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated, but where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be official information to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made. The account against Buford is founded on a receipt and was made out on the day it was assigned to Morrison under a special Act

of Congress. Until this time *Morrison* was charged on the books of the treasury with this sum of ten thousand dollars, and there can be no doubt that he and his sureties were liable for it. As the advance of this sum to Buford was not made in pursuance of any authority, the treasury officers had no right to release Morrison from liability by crediting his account with so much money paid to Buford. The declaration being special upon a treasury account, and the account being raised upon the assignment of a receipt, the claim of the United States to the sum in controversy, as presented, cannot be considered as existing prior to the assignment."

It needs no argument to show that a treasury account growing out of the circumstances and acts surrounding a business transaction, to deal with which it had required a special Act of Congress, applying to private individuals, is not a transaction arising in the ordinary course of departmental business and routine, and the Court might well say that the department officers had no official knowledge of the facts, and that when they undertook to certify and determine them they were acting without the scope of their authority.

The next case quoted and relied upon by the Defendant in Error was that of the United States vs. Smith, 35 Federal, 490, which was a case where a certain *gross* charge contained in a treasury transcript was rejected as evidence:

"Among the various papers forming the transcript is a statement purporting to be a copy of Smith's 'consolidated account' as borne on the books of the treasury department. On the debit side of the account he is charged with the sum of $1,777.03 'for government property received at the Western

Shoshone Agency and not properly accounted for.' The transcript of the 'consolidated account' doesn't show of what the property consisted, nor the manner in which the value of the same was ascertained. * * * Respecting this latter paper it should also be said that it doesn't profess to be a transcript from any book kept, or a copy of any document on file, in the treasury department. * * * But a transcript from a book which merely shows a charge in gross against the officer for the value of public property, without describing the property or the method of valuation, or the manner in which it came to his hands, or the disposition made of the same, is of no value even under Section 886."

There is certainly nothing so far in that case that applies to the case at bar. It could hardly be said that a gross charge, such as the one in that case, that neither disclosed the items of which it is composed nor the value, was in any sense an "account" or "statement of account" as contemplated in Sections 886 or 889 R. S. But no such objection could be urged against the statement of account in this case, which is:

Statement of Account for Amount of Actual Damage.

Dr. *C. C. McCoy (Col.) Failing Contractor, in account with the United States,* Cr.

Route 76,475	To amount paid J. M. Gorman, for temporary service, from May 5, to August 13, 1883	$4,827 77	Route 76,475	By transportation from April 1, to August 13, 1893	$2,845 65
"	To amount of fine, 3d quarter, 1893	5 00		By balance	5,772 99
"	To difference between his contract at $7,700.00 and the contract of Max Popper, at $12,000.00 per annum, from August 14, 1893, to June 30, 1894	3,785 87			
		$8,618 64			$8,618 64
	To balance	$5,772 99			

This shows definitely what the items of charge are and the amounts of each, and certainly the drawing and paying of warrants for these items are matters within the official knowledge of the officer of the department charged with keeping these accounts.

In the case of the United States vs. Smith, supra, it was said:

"But the defendant's money transactions with the Government stand on a different footing. The transcript is competent, under Section 886, to show what public moneys the defendant received and what disbursements made by him have been approved."

In that case the defendant was an Indian agent connected with the Shoshone and other Western agencies. Now can it be said that the actual knowledge, or means thereof, of the person in Washington City who made the entries or charges against Smith are shown to be, or in likelihood were, any greater or more certain than that of him who made them against McCoy, or that the one had more certain official knowledge that Smith "received" certain money than the other had that McCoy "failed" to carry certain mail?

The next case cited by the Defendant in Error, United States vs. Jones, 8 Peters, 375, was a case where certain charges in a treasury transcript were held to have been made in gross and not itemized; and further, that they were not made in the ordinary mode of doing business in the department, and that the law had provided other means of certifying copies to make such charges susceptible of prima facie proof.

and on these grounds such entries were rejected as evidence. In that case the Court said:

"The issuing of the warrants to Orr (defendant's intestate), was an official act 'in the ordinary mode of doing business in the department,' and the fact is proved by being certified as the act of Congress requires. But the execution of bills of exchange and orders for money on the treasury, though they may be connected with the settlement of an account, cannot be official information to the accounting officers. In such cases, however, provision has been made by law by which such instruments are made evidence without proof of the hand writing of the drawer. * * * The following item was also objected to by the defendant's counsel, 'to accounts transferred from the books of the Second Auditor for this sum standing to his debit under said contract on the books of the Second Auditor transferred to his debit in this office, $45,000.00.' This item was properly rejected by the Circuit Court. The Act of Congress in making a 'transcript from the books and proceedings of the treasury' evidence, does not mean the statement of an account *in gross*, but as they were acted upon by the accounting officers of the department."

It is impossible to see wherein this case applies to the one at bar.

The next case cited by the Defendant in Error is that of the United States vs. Patterson, Gilp 47, Federal Case No. 16,008. That was a case where the paper offered in evidence was a register's report to the Comptroller and not a certified "transcript from the books and papers of the treasury," and in that case the defendant therein only directed his objection

to the one item, "to balance due on statement of his account per report No. 15,877, $13,723.78." It was said in that decision:

"The question to be tried by this jury is the correctness of this adjusted reported balance, but if it is allowed to prove itself, what is to be tried? If a treasury certificate that such is the balance reported to be due is enough to entitle the United States to a verdict and judgment for that amount, the trial is a mere pretense and useless form, which might be dispensed with and a judgment entered at once upon the production of the certificate. This cannot be the intention of the law."

Of course it is clear that this decision is eminently correct. To merely report a balance as due from a defendant would leave neither a question of law nor of fact to be tried or decided, that is, whether the item was legally charged or not, but the case is not an authority one way or the other in the case at bar.

In the case at bar the items of damage to the United States, by reason of defendant's failure, are clearly and expressly set out in the settled account. If they involve the question of the measure of damage or other legal question, defendants could take advantage thereof upon an objection to its sufficiency or competency as evidence, and likewise it is definite enough if they wish to take issue and disprove either the fact of damage or the amount thereof, or other fact connected with the items.

In the next case cited by Defendant in Error, United States vs. Edwards, 1st McLean, 463, Federal Case No. 15,026, it was decided that a statement of an account *in gross* showing simply balances, was not evidence. Therein it was said:

"The treasury officers seem to pay more regard to their own peculiar forms than to the requisites of the law or the decisions of the courts of the United States. It has long since been decided by the Supreme Court, United States vs. Jones, 8 Pet., 33, U. S., 383, that the Act of Congress in making a transcript from the books and proceedings of the treasury evidence, doesn't mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. * * * Controversies frequently arise on treasury adjustments because certain items claimed as credits are disallowed or certain debits are charged, and how can the Court decide on these items if they be not stated in the transcript? A transcript must present the accounts to the Court as they stood before the accounting officers, and the judgment of the Court must be given on this evidence."

The next case cited and quoted by the Defendant in Eror is that of the United States vs. Carr, 132 U. S., 644, wherein it was decided that there was no presumption that the postmasters at Santa Rita and Natividav knew of the terms of a mail carrier's contract and that he was not complying therewith. Just wherein this case applied and is an argument for or against the proposition of the effect of the Postmaster General's finding that the Defendant in Error, McCoy, was a failing contractor, and his knowledge in that regard, it is impossible for me to conceive.

An analysis of the foregoing excerpts will show that the certified statements from the Auditor and other officers in the departments held incompetent therein by the Courts were so held either by reason of the charges being gross charges, mere

balances, or because it was shown that they were not made in the ordinary departmental methods of transacting business. These decisions throughout distinguish between actual and official knowledge and between official knowledge and knowledge derived from hearsay, as the facts are disclosed in these cases, information from hearsay means information from private, not official, sources, and to be incompetent requires the further disqualification of being obtained otherwise than in the ordinary course of doing business. This Court has said in its former opinion (Record, page 31):

"The postmaster at San Francisco appears to have had knowledge of this fact (referring to the abandonment by McCoy of the performance of his contract), and all the subsequent proceedings were based upon his statement of this fact in a telegram to the Second Assistant Postmaster General."

Can it in any sense be said that such information is hearsay? Did not that telegram convey to the Postmaster General, his Assistants and the Auditor and Accountants in that department "official knowledge" of the abandonment by McCoy of the performance of his contract, and with that knowledge render regular and competent all subsequent action, the charges of items, settlement of account and certification? Can it be said that the cablegram to the Secretary of the Navy from an Admiral that he has destroyed a hostile fleet and captured a foreign city doesn't give the former official knowledge of those facts?

I would also cite in this connection:

Soule vs. United States, 100 U. S., pages 8 to 11.
United States vs. Dumas, 149 U. S., page 278.
Culver vs. Uthe, 137 U. S., page 655.
United States vs. Egleston, 25 Federal Cases, Case No. 15,027.
United States vs. Stone, 106 U. S., page 525.

A ruling seems to me necessary to uphold this judgment that the evidence must be a fac simile of the pleadings, and this would result in all suits arising in the departments upon stated accounts in compelling the attorney to set out in his complaint, first, the contract, second, the Auditor's statement of the defendant's account, finding him indebted in so much, and third, refusal and failure to pay. Such a complaint would not give definite and full information of the cause of action sued on that the one in this case did, and I submit that any ruling that the proofs do not correspond with the allegations of the complaint is unjustified under our rules of pleading. Second Ballinger's Code, 4903 and 4906. The stated account is itself evidence of not only the amounts, but the fact of indebtedness itself, which fact includes the breach of contract by failure to carry mails, of which it is complained there is no proof. United States vs. Stone, supra.

There is another feature in this case which I find nothing in the record to convince me received consideration upon the former hearing. The contract between McCoy and the Government provides, among other things (page 86 of the Record):

"And it is further stipulated and agreed, that the Postmaster General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Postoffice Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster General, the service cannot be safely performed, the revenues collected, or the laws maintained.

"And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Postoffice Department."

There are many analagous provisions to the above both in the Government's construction contracts and those of private persons giving engineers and architects the authority to determine and declare or certify the performance or failure to perform on the part of the contractor, and it has been uniformly upheld that such determinations, in the absence of fraud, were conclusive. The above quoted portion of the contract in this case gave the Postmaster General power to find there had been failures to perform and that the service could

not be safely performed, and upon that finding to annul the contract, and further, that in such cases the Auditor might assess and liquidate the damages. In pursuance of these provisions, upon information communicated from an official source, on May 18th, 1893, the Postmaster General determined and declared (Record, page 96):

"State of California. No. 76,475.

"Regulation Wagon Service, San Francisco, San Francisco County. Contractor, C. C. McCoy. Pay, $7,700.00.

"Whereas, C. C. McCoy, contractor on this route under the advertisement of September 16, 1889, has failed to perform the service he is hereby declared a failing contractor.

"W. S. BISSELL,
"Postmaster General.

"Date, May 18, 1893."

Thereby not only annulling the contract, but finding that prior to that date, May 18th, 1893, McCoy had "failed to perform the service" thereunder. I believe if the above provision had been called to the attention of this Court upon the former hearing, it would not have decided that a "material allegation of the complaint was that on the 8th day of May the said C. C. McCoy and the said sub-contractors did abandon the said contract and did fail and refuse to perform the same," and that "the statement of McCoy's account by the Auditor of the Postoffice Department, * * * and certificate of the Postmaster General dated May 18th, 1893, declaring that McCoy had failed to perform the service and was a failing contractor, were all legally insufficient to establish the fact that McCoy had wholly abandoned his contract," for I cannot

escape the conviction that the Postmaster General's finding and certification is not only evidence of the failure to perform, but conclusive evidence of that fact.

In further pursuance of the provision above quoted, and also under the authority of the statute, the Auditor of the Treasury for the Postoffice Department, on June 1st, 1895 in a statement and settlement of McCoy's account with the United States, "assessed and liquidated" the damages the Government had sustained by reason of such breach and failure to perform the service contracted for, at $5,772.99. (Record, page 53.)

For the foregoing reasons, it is respectfully submitted that the Court erred as more specially appears by assignments of error, supra, and that the judgment of the lower Court should be reversed, with instructions to enter judgment against defendants for the above amount, interest and costs.

WILSON R. GAY,
United States Attorney.

EDWARD E. CUSHMAN,
Assistant United States Attorney.